Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PFIZER INC,

Petitioner,

vs.

TEXAS PROPERTY and CASUALTY INSURANCE GUARANTY ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTIONS PRESENTED

This petition presents the following questions:

1. Did *Carden v. Arkoma Associates* establish a bright line test that for diversity purposes limits juridical citizenship to corporations only?

2. Did *Carden v. Arkoma Associates* preclude the judicial branch of the United States from even considering whether any entity, other than a corporation, has juridical citizenship for diversity purposes?

3. Is the Texas Property and Casualty Insurance Guaranty Association, a quasi-governmental agency, a juridical citizen of Texas for purposes of diversity jurisdiction?

4. Did the Texas Legislature unconstitutionally limit the jurisdiction of federal courts by denominating the Texas Property and Casualty Insurance Guaranty Association an "association" rather than a "corporation"?

5. Can the Texas legislature enable the Texas Property and Casualty Insurance Guaranty Association to defeat federal jurisdiction by naming it an association as opposed to a corporation?

LISTING OF PARTIES

1. Petitioner: Pfizer Inc

2. Respondent: Texas Property and Casualty Insurance Guaranty Association

CORPORATE DISCLOSURE STATEMENT

Pfizer Inc has no parent corporations. No publically held companies own more than ten percent of Pfizer Inc.

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The Opinion of the United States Court of Appeals, Fifth Circuit, is reproduced in the appendix to this petition. App. 1. The Order of the United States District Court for the Western District of Texas, Austin Division, is reproduced in the appendix to this petition. App. 3.

JURISDICTIONAL STATEMENT

The Order of the United States Court of Appeals, Fifth Circuit, was entered on February 9, 2000. This petition was timely filed pursuant to Supreme Court Rule 13 within 90 days after the entry of judgment of the United States Court of Appeals, Fifth Circuit. Cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari. 28 U.S.C. § 1254 (1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III of the United States Constitution is reproduced in the appendix. App. 9. Article VI, clause 2 of the United States Constitution is reproduced in the appendix. App. 10. In addition, 28 U.S.C. § 1332 is reproduced in the appendix. App. 11.

STATEMENT OF THE CASE

The Texas Property and Casualty Insurance Guaranty Association ("Texas Fund") was created by the Texas legislature as a part of its program to regulate insurance

companies admitted to do business in Texas. The Fund is available for two categories of claimants: 1) Texas residents whose claims have not been paid because an insurance carrier admitted to do business in Texas ("Admitted Carrier") is insolvent, and 2) policyholders, like Pfizer, who have paid Texas residents for claims because of an Admitted Carrier's insolvency. In order to become an Admitted Carrier in Texas, an insurance company must contribute money to the Texas Fund. It is those contributors who are "members" of the Texas Fund. The Admitted Carriers receive a state tax credit to offset the contribution to the Fund. The Texas Fund, therefore, is actually funded by the State of Texas and its residents. The "members" have no control over the Fund's assets, business, or involvement in litigation.

This dispute arises because Pfizer paid claims to Texas residents that should have been, but were not, paid by Texas Admitted Carriers that were insolvent. Pfizer presented a claim on the Texas Fund for reimbursement of amounts it paid to Texas claimants that should have been covered by the insolvent insurance companies or by the Texas Fund. Pfizer's claim to the Texas Fund was denied. As a result, this lawsuit was filed in federal court based on diversity of citizenship.

The Texas Fund filed a Motion to Dismiss based on lack of diversity. Pfizer is not a Texas citizen. It is a Delaware corporation with its principal place of business in New York. The Texas Fund, a quasi-governmental agency, was denominated by the Texas legislature as an "association" rather than a "corporation." The district court granted the Motion to Dismiss and concluded that it was bound by precedent to find that the Texas Fund is

not a juridical citizen[1] of Texas, but a citizen of every state in which its "members" are citizens. This decision was affirmed by the United States Court of Appeals for the Fifth Circuit. Pfizer respectfully urges that the Texas Fund is a juridical citizen of Texas for diversity purposes, and therefore the courts below committed error.

ARGUMENT AND AUTHORITIES

The first three questions presented are interrelated and will be argued under Section I. Pfizer argues that, contrary to the position taken by the lower courts, *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), did not establish a bright line test that precludes federal courts from even considering whether a non-corporate entity has juridical citizenship. Specifically, Pfizer argues that the Texas Fund is a juridical citizen of Texas. It is not like any organization previously examined by this Court in a diversity case. The Texas Fund has no real "members." It has no functional existence outside of Texas. It is a quasi-governmental agency controlled by the State of Texas.

In Section II, questions four and five will be addressed. Pfizer argues that the Texas legislature has unconstitutionally abridged the jurisdiction of the federal courts. If the Texas legislature had denominated the Texas Fund a corporation, the federal court would have subject matter jurisdiction based on diversity of citizenship. If

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[1] The term "juridical citizen" is used as it was in *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), to mean an entity that has citizenship status independent and apart from its membership.

only corporations have juridical citizenship, the Texas legislature abridged the subject matter jurisdiction of the federal courts by denominating the Texas Fund an association. The designation given to the Fund by the Texas legislature should not control a federal court's decision about citizenship status for diversity purposes.

I.

The Texas Fund Is a Unique, Quasi-Governmental Entity, that Is a Juridical Citizen of Texas for Diversity Purposes

In this case, the United States Court of Appeals for the Fifth Circuit wrongly decided several important questions of federal law. Specifically, it decided that *Carden v. Arkoma Associates* established a bright line test for determining the citizenship of all organizations. Under that bright line test, only corporations have juridical citizenship for diversity purposes. Federal courts cannot even consider the issue of whether a particular non-corporate entity is a juridical citizen. Then, applying that bright line test to the Texas Fund, the Fifth Circuit decided that, because the Texas legislature called the Texas Fund an "association," the Texas Fund is not a juridical citizen of Texas. Instead, it is a citizen of every state in which its "members" are citizens.

Application of the Bright Line Test of *Carden*

In the order at issue in this case, the Fifth Circuit did not address the merit of Pfizer's position, but held, as it did in *Temple Drilling Co. v. Louisiana Insurance Guaranty*

Association, 946 F.2d 390 (5th Cir. 1991), that *Carden* established a bright line test that put corporations on one side of the juridical citizenship line and all other entities, including unincorporated associations, on the other. Neither *Carden*, nor any other decision of this Court, has addressed the citizenship of a unique, quasi-governmental entity, like the Texas Fund.

This Court should clarify that *Carden* does not establish a bright line test that precludes federal courts from even considering the issue of whether a particular organization is a juridical citizen. Based on appropriate application of analogous cases, logic, public policy and fundamental fairness, this Court should grant the writ and hold that the Texas Fund is a juridical citizen of Texas for purposes of deciding diversity jurisdiction.

The Texas Fund is not an investment vehicle like the limited partnership in *Carden*. In fact, the Texas Fund is not like any private business organization that previous Supreme Court cases have discussed in determining citizenship for purposes of diversity jurisdiction. The Texas Fund was created by the Texas legislature to perform a public function, namely regulation of Texas Admitted Carriers. *See* TEX. INS. CODE ANN. Art. 21-28-C, sec. 6 (Vernon 1981 & Supp. 1999); *see also* Texas Property and Casualty Insurance Guaranty Association Plan of Operation, App. 18. The Texas Fund is simply a fund of money. This money comes from insurance sales made in Texas. The funds are held in trust for Texas residents and insureds, like Pfizer, that have paid Texas residents, when a Texas Admitted Carrier becomes insolvent. The Texas Fund is regulated by the State of Texas, and is directly

administered by the Texas Insurance Commissioner, an official of the State of Texas.

Development of the Court's Diversity Jurisdiction Analysis

Previous decisions of this Court are instructive, but not precedential. Past cases have addressed investment vehicles or other types of private business organizations. No prior case before this Court has decided the citizenship of an organization remotely similar to the Texas Fund.

Long ago, this Court held that a corporation is a juridical citizen independent of its shareholders for diversity purposes. *Louisville, C.&C.R. Co. v. Letson*, 43 U.S. 497, 558 (1844). Importantly, this decision was not directed, influenced or informed by any specific legislation. Congress did not address corporate citizenship for diversity purposes for more than 100 years after *Letson* was decided.

After *Letson*, this Court has examined other investment vehicles and forms of private business organizations to determine their citizenship status for diversity purposes. When doing so, this Court has not applied a bright line test, granting juridical citizenship to corporations and denying it to all other business organizations. Instead, this Court has reached different results based on the particular characteristics of the organization at issue. Twice this Court has granted juridical citizenship status to non-corporations. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980) and *Puerto Rico v. Russell & Co.*, 288 U.S. at 481. *Carden*, itself, cannot correctly be read as establishing a

bright line test, limiting juridical citizenship to corporations and denying it to all other entities, because *Carden* did not overrule *Navarro* or *Russell*.[2]

Exceptions to the Bright Line Rule

In *Navarro Savings Ass'n v. Lee*, the organization at issue was a **business trust.** 446 U.S. at 459. That organization was plaintiff in a suit filed in the United States District Court for the Northern District of Texas based on diversity. The defendant was a Texas citizen and asserted lack of diversity, because some of the trust's beneficial shareholders were also Texas residents. This Court held that the trust, although technically an unincorporated

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[2] The *Carden* opinion does not state that it is applying a bright line rule. However, as exhibited by the decisions of the lower courts in this case, that is the application being given to *Carden*. *See also Temple Drilling*, 946 F.2d at 393 (stating that in *Carden*, the Supreme Court "held that, with the exception of corporations, the citizenship of an artificial entity for purposes of diversity is the citizenship of each of the entity's constituent members."); *JMTR Enter., L.L.C. v. Duchin*, 42 F.Supp.2d 87, 94 (D. Mass. 1999) (observing that in *Carden*, the Supreme Court declined to expand juridical citizenship to any entity other than a corporation).

Carden can certainly be read as an opinion that reflects a decided bias against any unreasonable expansion of diversity jurisdiction. The burden imposed by diversity jurisdiction is unquestionably great. Granting juridical status to investment vehicles, and private business organizations that do business interstate and internationally, would dramatically add to the federal court case load. That is not the case with granting juridical status to the Texas Fund, which is unquestionably linked to Texas and no other state.

association, had citizenship status distinct from its beneficial shareholders. *Id.* at 465. Those shareholders, this Court held, were not "real parties in interest." Writing for eight members of the Court, Justice Powell stated:

> Early in its history, this Court established that the "citizens" upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy [citations omitted]. Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.

Id. at 460-61. If this remains a correct statement of the law, the Texas Fund is unquestionably a juridical citizen of Texas. The "members" of the Texas Fund are not real and substantial parties to the controversy.

In *Puerto Rico v. Russell & Co.*, this Court held that the business organization in question, a Puerto Rican ***sociedad en comandita,*** although an unincorporated association, had citizenship distinct from its members. This Court focused on the close relationship between Puerto Rico and the *sociedad's* organizational format. This Court rejected the "false analogy" that the *sociedad* was another incarnation of a partnership, and emphasized that the *sociedad* could not function outside of Puerto Rico. 288 U.S. at 480-81.

Carden did not overrule either *Navarro* or *Russell.* Obviously, the Court recognized that some organizations that are not corporations can have juridical status. Therefore, a bright line test is inconsistent with the holdings of *Navarro* and *Russell.*

In other instances, this Court has found that the organization under investigation did not have citizenship distinct from its members. This was true of a **joint stock corporation**, *Chapman v. Barney*, 129 U.S. 677 (1889), **labor union**, *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965), and **limited partnerships**, *Carden v. Arkoma Associates*, 494 U.S. at 195, and *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900). In all of these cases, the "members" had equivalent power and control of the association's assets, business, and litigation. *Carden*, 494 U.S. at 204 (O'Connor, J., dissenting).

The Texas Fund is structured differently from any organization that has been denied juridical citizenship. None of its "members" have control over the Fund's assets, business, or involvement in litigation. These functions are carried out by the Texas Attorney General and the Insurance Commissioner – officials of the State of Texas.

The Texas Fund is a Juridical Citizen of Texas

The Texas Fund is a juridical citizen of Texas. The Texas Fund and the State of Texas are virtually inseparable. The Texas Fund does not meaningfully exist or function outside of Texas. In fact, when sued outside Texas, the Texas Fund, itself, argues that it has no minimum contacts with any state but Texas.[3]

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[3] In Texas, the law is that Texas courts have no personal jurisdiction over an out-of-state guaranty fund even if a "member" is a Texas citizen. This is inconsistent with the premise that a member insurance company is a real party in

Although logical consistency is not always legally determinative, logical absurdities threaten the rule of law and should be avoided. Asserting that the Texas Fund has no minimum contacts in any state other than Texas, but at the same time asserting that, for diversity purposes, the Texas Fund is a citizen of virtually every state, is a logical contradiction that no amount of tortured reasoning can reconcile. The Texas Fund has no real "members." The reality is that the entire purpose and function of the Texas Fund is rooted in Texas and limited to Texas. The Fund is a Texas citizen.

Importantly, the "members" of the Texas Fund were not even listed by the Texas Fund as "interested persons" when the Texas Fund executed its "Certificate of Interested Persons" in its brief to the Fifth Circuit as required by Fifth Circuit Rule 28.2.1. *See* App. 6-8. This omission boldly reflects the reality that the "members" of the Texas Fund are not "real and substantial parties to the controversy." *See Navarro,* 446 U.S. at 460-61. The Fund, controlled by the State of Texas, is an independent entity that is a juridical citizen only of Texas.

The Texas Fund may act and sue and be sued in its own name. TEX. INS. CODE ANN. Art. 21-28-C sec. 8(h)(3). Its "members are not thought to have a sufficient personal interest in the suit brought against the entity to entitle them to intervene as party defendant." *See Russell,*

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interest. *See Texas Property and Cas. Ins. Guar. Ass'n v. Boy Scouts,* 947 S.W.2d 682 (Tex. App. – Austin 1997, no writ). It is also grossly inconsistent with the argument that such a fund is, for diversity purposes, not a citizen of Texas because it has out-of-state "members."

288 U.S. at 481; *see also* TEX. INS. CODE ANN. Art. 21-28-C, sec. 11(d).

Public Policy invoked in *Carden* Does Not Apply to the Texas Fund

The public policy that supports *Carden* and similar decisions simply is not applicable to the Texas Fund. The very essence of the Texas Fund is unlike any investment vehicle or private organization such as a limited partnership. The Texas Fund is not an organizational vehicle for capitalizing a virtually limitless assortment of business ventures able to transact business throughout the United States and the world. It is a specific fund of money created by the Texas government and financed exclusively by funds generated in Texas. It was established for the benefit of Texas residents, and others, like Pfizer, who have paid Texas residents, when an insolvent Texas Admitted Carrier did not.

The exclusive connection between the State of Texas and the Texas Fund is illustrated by the following facts. All funds collected by the Texas Fund must be deposited with the Texas Treasury Safekeeping Trust Company. *Id.* sec. 8(j). All activities of the Texas Fund are effectively controlled by the Texas State Insurance Commissioner. The Texas Fund is administered by a "plan of operation," that is effective only after approval by the Texas State Insurance Commissioner. *Id.* sec. 9(a); *see also* App. 18-33. This plan of operation establishes procedures for handling the assets of the Texas Fund, methods of reimbursement, claims filing, and acceptable forms of proof of

covered claims. TEX. INS. CODE ANN. Art. 21-28-C, sec. 9(c); *see also* App. 26-7. The plan of operation, in fact, governs the day-to-day operations of the Texas Fund. TEX. INS. CODE ANN. Art. 21-28-C, sec. 9(f).

Like other governmental or quasi-governmental agencies, the Texas Fund is exempt from State of Texas taxation. *Id.* sec. 15. The Texas Fund, its agents, and employees all are granted immunity by the State of Texas from liability. *Id.* sec. 15, 16(a). The Texas Attorney General is charged with representing the Fund for any act for which it enjoys immunity. *Id.* sec. 16(b). The Texas Fund is also permitted to contract with the Texas Attorney General under the Interagency Cooperation Act, a right that the Texas Fund has only because it is so closely affiliated with the State of Texas. *Id.*

These provisions establish that the Texas Fund is a fundamentally public and quasi-governmental entity. It is exclusively tied in appearance and, in fact, with the State of Texas, and does not function in any other state. Tellingly, the Texas Attorney General has actually argued that the Texas Fund is quasi-governmental. *See In re Texas Property and Cas. Ins. Guar. Ass'n,* 989 S.W.2d 880, 886 (Tex. App. – Austin 1999, no writ).

No prior opinions of this Court have addressed the citizenship of a quasi-governmental organization or any organization so closely identified with a particular state as the Texas Fund is identified with the State of Texas. The organizations addressed in *Navarro* and *Russell* are much more analogous to the Texas Fund than any of the other organizations previously reviewed by this Court. For example, the key characteristic of the *sociedad* cited in

Russell to support separate citizenship for that organization, *i.e.*, its close association with Puerto Rico, is similar to the Texas Fund. The relationship between the Texas Fund and the State of Texas, however, is much closer than the relationship between the *sociedad* and Puerto Rico.

II.

The Texas Legislature Improperly Limited the Jurisdiction of the Federal Courts

If the Texas legislature had denominated the Texas Fund a "corporation" instead of an "association," Pfizer, unquestionably, would be entitled to litigate this case in federal court under diversity jurisdiction. A state cannot constitutionally limit the jurisdiction of the federal courts. Yet, if only corporations are entitled to juridical status, the State of Texas, by denominating the Texas Fund an association, has ousted federal courts of jurisdiction they would otherwise have. This violates the Constitution. Infringement on the power of the federal courts by the states is prohibited by the interrelationship between Article III, § 2 and the Supremacy Clause of the Constitution of the United States.

A State May Not Defeat Federal Jurisdiction

The United States Constitution creates the power of the federal judiciary and "the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious" that Constitutional power. *Harrison v. St. Louis & S.F.R. Co.*, 232 U.S., 318, 328 (1914). The "doctrine is so elementary

as to require no citation of authority to sustain it." *Id.* *Harrison* involved an attempt by the legislature of Oklahoma to defeat diversity jurisdiction by "arbitrarily creating a fictitious legal status incompatible with [diversity jurisdiction]." *Id.* at 336. Oklahoma legislated that all persons and entities that conducted business in Oklahoma were deemed citizens of Oklahoma, and, if they asserted otherwise in any court, their right to do business in Oklahoma was forfeited. Indirectly, but just as effectively, the Texas legislature has done the same in this case by denominating the Texas Fund an "association" and requiring "membership" in the Fund as a prerequisite for writing insurance in Texas.

In *Rundle v. Delaware & Raritan Canal*, the Court used the following words to describe the Constitutional genesis of the power of the federal courts, and the wisdom that demands that the federal courts diligently protect their power from state infringement:

> If the federal courts [c]ould be ousted of jurisdiction, and citizens of other States be forced into the State courts, without the power of election, they would often be deprived, in great cases, of all benefits contemplated by the Constitution; and in many cases be compelled to submit their rights to judges and juries who are inhabitants of the city where the suit must be tried, and to contend with powerful corporations, where the chances of impartial justice would be greatly against them; and where no prudent man would engage with such an antagonist.

55 U.S. 80, 95 (1852).

The states "have no power to enlarge or contract the federal jurisdiction." *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1315 (9th Cir. 1982). Thus, state law may not control or limit the diversity jurisdiction of federal courts. *Id.*; *see also Truck Components, Inc. v. Beatrice Co.*, 143 F.3d 1057, 1061 (7th Cir. 1998); *Webb v. Tom Brown, Inc.*, 807 F.2d 783, 784 (9th Cir. 1987); *Beach v. Owens-Corning Fiberglas Corp.*, 728 F.2d 407, 409 (7th Cir. 1984); *Streeter v. Amerequip Corp.*, 968 F.Supp. 624, 627 (D. Wyo. 1997).

Federal Courts Are Charged with Zealously Guarding Their Jurisdiction

Federal courts "have an affirmative responsibility to guard their own jurisdiction." *Poitra v. Demarrias*, 502 F.2d 23, 26 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975). "Any attempt by a state or local government to tell a federal judge what he or she must do to lawfully perform federal duties offends elemental notions of federal supremacy." *Jefferson County v. Acker*, 92 F.3d 1561, 1572-73 (11th Cir. 1996).

State statutes will not be applied to thwart the purposes of statutes of the United States. Although the Texas legislature did not directly divest the federal courts of jurisdiction over the Texas Fund, calling the Texas Fund an association had this impermissible effect if a bright line test is applicable to the Texas Fund. An indirect restriction on federal jurisdiction is also inappropriate, as other courts have specifically held that a state cannot "by definition or characterization" enlarge or narrow federal jurisdiction. *Arthur v. E.I. DuPont de Nemours & Co.*, 58 F.3d 121, 125 (4th Cir. 1995).

The citizenship of a state created entity should be controlled by two factors: where it was created and its principal place of business. In *Wildner Contracting Co., Inc. v. Ohio Turnpike Commission*, a federal court considered the citizenship of the Ohio Turnpike Commission ("OTC") for purposes of diversity jurisdiction. 913 F.Supp. 1031 (N.D. Ohio 1996). The federal court had no difficulty with recognizing the OTC as a citizen of Ohio. "Wildner is a citizen of Pennsylvania, where it is incorporated and has its principal place of business. Similarly, the OTC is a citizen of Ohio, since it was created by the State of Ohio and has its principal place of business in Berea, Ohio." *Id.* at 1037. The federal court did not hesitate in recognizing the OTC was a citizen of Ohio because it was so closely tied to that specific state. Based on the characteristics of the OTC and the plaintiff, the court concluded "the requirements for the exercise of diversity jurisdiction are satisfied." *Id.*

The Ohio legislature attempted to require that suits against the OTC be brought in the state's court of common pleas. *Id.* As a result of this statute, the federal court would have been prevented from exercising jurisdiction over the OTC. Importantly, the same Ohio statute creating the OTC also stipulated that the OTC could "sue and be sued in its own name." *Id.* (*citing* Ohio Rev. Code § 5537.04(A)). The federal court wrote that Ohio was certainly permitted to wrap itself and the entities it created in a cloak of sovereign immunity. "However, once a state elects to make a state-created entity subject to suit, the entity is subject to the provisions of Article III, § 2 of the United States Constitution and 28 U.S.C. § 1332(a)(1) giving the federal courts jurisdiction over claims between

citizens of different states." *Id.* (citations omitted). The court concluded "Ohio chose to make the OTC amenable to suit. It cannot by statute subsequently divest this Court of its diversity jurisdiction over the OTC." *Id.*

Texas also permits the Fund to sue and be sued. By denominating the Texas Fund an association, rather than a corporation, the State of Texas cannot divest this Court of diversity jurisdiction it would otherwise have but for the action of the state legislature.

The federal courts have a constitutionally mandated duty to protect their own jurisdiction, and may not abandon a case they have the power to hear to a state court. As a result, federal courts are vigorous in the defense of their own jurisdiction when state legislatures attempt to divest them of jurisdiction. *See McKeown v. LTV Steel Co.*, 117 F.R.D. 139, 143 (N.D. Ind. 1987) (citing *In re Martin-Trigona*, 737 F.2d 1254, 1261 (2d Cir. 1984), *cert. denied*, 474 U.S. 1061 (1986)). A state may not enact legislation requiring a federal court to turn over a matter to the state courts, yet this is precisely the effect of the Texas Property and Casualty Insurance Guaranty Act, if the bright line test is applicable.

CONCLUSION

Carden v. Arkoma Associates did not establish a bright line test determining that only corporations have juridical status. That decision did not overrule *Navarro* and *Russell*, and this underscores the fallacy that juridical citizenship is granted only to incorporated entities. Federal courts are entitled to evaluate the juridical citizenship of unique

non-corporate entities when determining diversity jurisdiction. Upon evaluating the Texas Fund, the Court should determine the Texas Fund is a juridical citizen of Texas. The Texas legislature's decision to name the Texas Fund an association cannot be permitted to limit the jurisdiction of the federal courts.

PRAYER

Pfizer Inc respectfully requests this Court to grant this Petition for Writ of Certiorari and to review and reverse the Order Granting the Motion to Dismiss of the United States District Court for the Western District of Texas, Austin Division, in its Cause No. A99-CA-143SS, rendered on August 3, 1999 and the Opinion of the United States Court of Appeals, Fifth Circuit, rendered on February 9, 2000.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 99-50895
Summary Calendar

PFIZER INC,

Plaintiff-Appellant,

v.

TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas
(A-99-CV-143-SS)

(Filed Feb. 9, 2000)

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:*

Pfizer, plaintiff-appellant, appeals the dismissal of the case by the district court for lack of subject matter jurisdiction. We have reviewed the record and the parties'

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

briefs and AFFIRM for essentially the same reasons stated by the district court in its order dated August 3, 1999.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PFIZER, INC.,	§	
Plaintiff	§	
	§	
vs.	§	
TEXAS PROPERTY AND	§	**NO. A 99 CA 143 SS**
CASUALTY INSURANCE	§	
GUARANTY	§	
ASSOCIATION,	§	
	§	
Defendant	§	

ORDER

(Filed Aug. 3, 1999)

BE IT REMEMBERED that on the 3rd day of August 1999, the Court reviewed the file in the above-styled cause and specifically Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction [#4] and Pfizer, Inc.'s Response to Defendant's Motion to dismiss [#5]. The Court also received a letter brief in reply to the plaintiff's response, but the letter brief was not properly filed with the Clerk of Court. Because the letter brief was apparently sent to opposing counsel, however, the Court will admonish the defendant to properly file motions and briefs and order the Clerk of Court to file the defendant's letter brief, which is attached hereto as Appendix A. The parties dispute whether this Court has subject matter jurisdiction under 28 U.S.C. § 1332, which provides for diversity of citizenship jurisdiction. After a review of the entire record, the Court is of the opinion that subject

matter jurisdiction pursuant to 28 U.S.C. § 1332 does not exist in this case and therefore dismisses the case.

The single issue before the Court is whether the defendant Texas Property and Casualty Insurance Guaranty Association ("TPCIGA") is solely a citizen of Texas or whether it is an association with citizenship in every state in which it has a member, including New York. It is undisputed that the plaintiff is a corporation with citizenship for purposes of diversity jurisdiction in New York and Delaware, and the amount in controversy exceeds $75,000. Therefore, if the defendant is construed as only a citizen of Texas for diversity purposes, there is diversity jurisdiction under 28 U.S.C. § 1332. If the defendant is considered a citizen of every state in which it has members, there is no diversity of citizenship and no basis for federal jurisdiction.

According to Texas statute, "The Texas Property and Casualty Insurance Guaranty Association is a nonprofit, unincorporated legal entity composed of all member insurers who must be members of the association as a condition of their authority to transact insurance in this state." TEX. INS. CODE ANN. art. 21.28-C, § 6. The defendant has filed an affidavit including certificates of authority that show that members of the TPCIGA are citizens of New York. *See* Defendant's Motion to Dismiss [#4], Exh. A.

The Fifth Circuit has held that an unincorporated association analogous to the TPCIGA is a citizen of every state in which it has members, destroying diversity jurisdiction. *See Temple Drilling Co. v. Louisiana Ins. Guar. Ass'n*, 946 F.2d 390, 393 (5th Cir. 1991). *Temple Drilling*

follows the Supreme Court precedent that states that with the exception of corporations, the citizenship of an entity or association made up of multiple members must be determined by the citizenship of all the members. *See Carden v. Arkoma Assocs.*, 110 S. Ct. 1015, 1021 (1990). Because the Texas statute states unequivocally that the TPCIGA is "unincorporated," the bright-line rule of *Carden* would dictate the result in this case even without the on-point, binding Fifth Circuit precedent in *Temple Drilling*. The plaintiff urges this Court to disregard Fifth Circuit and Supreme Court[1] precedent, but the Court rejects this invitation. Under the law this Court is bound to follow, TPCIGA is a citizen of every state in which it has a member, including New York, and there is no complete diversity as required to confer federal jurisdiction under 28 U.S.C. § 1322. This case will therefore be dismissed.

For the foregoing reasons, the Court enters the following orders:

IT IS ORDERED that the Clerk of Court FILE the attached letter brief of the defendant as a Reply to the Plaintiff's Response to the Defendant's Motion to Dismiss;

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[1] The plaintiff notes the Supreme Court decision was 5-4, but 5 votes is all that is needed to bind this Circuit and this Court, and a 5-4 decision is certainly not a rare phenomenon. Moreover, *Carden* is a remarkablly [sic] straightforward, coherent Supreme Court decision because it lacks the now-popular concurrences, concurrences in part, dissents in part and concurrences in the opinion, and special dissents.

IT IS FURTHER ORDERED that the Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction [#4] is GRANTED; and

IT IS FINALLY ORDERED that the above-styled and numbered cause is DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction.

SIGNED on this the 3rd day of August 1999.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

CERTIFICATE OF INTERESTED PERSONS

Case No. 99-50895

Pfizer, Inc. v. Texas Property and
Casualty Insurance Guaranty Association

The undersigned counsel of record for the Texas Property and Casualty Insurance Guaranty Association certifies that the following persons have an interest in the outcome of the case. These representations are made in order that Judges on this Court may evaluate possible disqualification or recusal:

1) Appellant Pfizer, Inc.

2) Appellee Texas Property and Casualty Insurance Guaranty Association.

3) Jack E. Urquhart and Pamela A. Clark of Beirne, Maynard & Parsons, L.L.P., Counsel for Pfizer, Inc.

4) Daniel Jordan of Jordan & Carmona, P.C., Counsel for Texas Property and Casualty Insurance Guaranty Association.

/s/ Daniel Jordan
Daniel Jordan
Attorney of record for Appellee

LOCAL RULE

28.2.1 Certificate of Interested Persons. *The certificate of interested persons required by this rule is broader in scope than the corporate disclosure statement contemplated in Fed. R. App. P. 26.1. The certificate of interested persons provides the court with additional information concerning parties whose participation in a case may raise a recusal issue. A separate corporate disclosure statement is not required. Counsel and unrepresented parties will furnish a certificate for all private (non-governmental) parties, both appellants and appellees, which must be incorporated on the first page of each brief before the table of contents or index, and which must certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. Each certificate must also list the names of opposing law firms and/or counsel in the case. The certificate must include all information called for by Fed. R. App. P. 26.1(a).*

(a) Each certificate must list all persons known to counsel to be interested, on all sides of the case, whether or not represented by counsel furnishing the certificate. Counsel has the burden to ascertain and certify the true facts to the court.

(b) The certificate must be in the following form:

(1) Number and Style of Case.

(2) The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

(Here list names of all such persons and identify their connection and interest.)

_____

*Attorney of record for*_____

_____

U.S. CONSTITUTION

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law

and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * *

ARTICLE VI

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

28 U.S.C. § 1332. (1993) Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

* * *

28 U.S.C. § 1332 (Supp. 1999) Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and cost, and is between –

* * *

TEXAS INSURANCE CODE

Art. 21.28-C (Vernon 1981 and Supp. 1999)

Sec. 5 (10) "Member insurer" means any insurer who:

(A) writes any kind of insurance to which this Act applies under Section 3 of this Act, including the exchange of reciprocal or inter-insurance contracts; and

(B) is licensed to transact insurance in this state, including any stock, mutual, Lloyds insurer, reciprocal or inter-insurance exchange, or county mutual insurance company.

* * *

Association

Sec. 6. The Texas Property and Casualty Insurance Guaranty Association is a nonprofit, unincorporated legal entity composed of all member insurers, who must be members of the association as a condition of their authority to transact insurance in this state. The association shall perform its functions under a plan of operation approved under Section 9 of this Act and shall exercise its powers through the board of directors. For purposes of administration and assessment, the association is divided into the workers' compensation insurance account, the automobile insurance account, and the account for all other lines of insurance to which this Act applies.

Board of Directors

Sec. 7. (a) The board of directors of the association is composed of nine persons who serve terms as established in the plan of operation. Five members shall be selected by member insurers, subject to the approval of the commissioner. To be eligible to serve as an insurance industry board member, a person must be a full-time employee of a member insurer. The remaining members shall be representatives of the general public appointed by the commissioner.

* * *

Sec. 8 (h) The association may:

* * *

(3) sue or be sued;

* * *

(j) The board of directors may deposit all money collected by the association into the Texas Treasury Safekeeping Trust Company in accordance with procedures established by the comptroller. The funds deposited shall be accounted for separately from all other funds by the comptroller to the association.

(k)(1) Notwithstanding Chapter 271, Acts of the 60th Legislature, Regular Session, 1967 (Article 6252-17, Vernon's Texas Civil Statutes), the board may hold an open meeting by telephone conference call if immediate action is required and the convening at one location of a quorum of the board is not reasonable or practical.

(2) The meeting is subject to the notice requirements applicable to other meetings.

(3) The notice of the meeting must specify as the location of the meeting the location where meetings of the board are usually held.

(4) Each part of the meeting that is required to be open to the public shall be audible to the public at the location specified in the notice of the meeting as the location of the meeting and shall be tape recorded. The tape recording shall be made available to the public.

Plan of operation

Sec. 9. (a) The association shall submit to the commissioner a plan of operation and any amendments necessary or suitable to ensure the fair, reasonable, and equitable administration of the association. The plan of operation and any amendments take effect on approval in writing by the commissioner.

* * *

(c) All member insurers shall comply with the plan of operation.

* * *

Duties and powers of commissioner

Sec. 10. (d) The commissioner shall suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this state of any member insurer that fails to pay an assessment when due or otherwise fails to comply with the plan of operation. As an alternative, the commissioner may assess a fine on any member insurer that fails to pay an assessment when due.

The fine may not exceed the lesser of five percent of the unpaid assessment per month or $100 per month.

* * *

(f) Any final action or order of the commissioner under this Act is subject to judicial review by a court of competent jurisdiction.

(g) Venue in a suit against the association or commissioner relating to any action or ruling of the association or commissioner made under this Act is in Travis County. The association or commissioner is not required to give an appeal bond in an appeal of a cause of action arising under this Act.

* * *

Examination of the association

Sec. 14. Not later than April 30 of each year, the association shall submit an audited financial statement to the state auditor for the preceding calendar year in a form approved by the state auditor's office.

Tax exemption

Sec. 15. The association is exempt from payment of all fees and all taxes levied by this state or any of its subdivisions except taxes levied on real or personal property.

Immunity; attorney general representation

Sec. 16. (a) There is no liability on the part of, and no cause of action of any nature arises against, any member insurer, the association or its agents or employees, the board of directors, receiver, special deputy receiver or its agents or employees, or the commissioner or the commissioner's representatives for any good faith action or failure to act in the performance of powers and duties under this Act.

(b) The attorney general shall defend any action to which Subsection (a) applies that is brought against a member insurer or its agents or employees, the association or its agents or employees, members of the association's board of directors, a special deputy receiver to its agents or employees, or the commissioner or the commissioner's representatives. This subsection continues to apply to an action instituted after the defendant's service with the guaranty association, commissioner, or department has terminated. The subsection does not require the attorney general to defend any person or entity with respect to an issue other than the applicability or effect of the immunity created by Subsection (a). The attorney general is not required to defend any member insurer of the association or its agents or employees, the association or its agents or employees, members of the association's board of directors, a special deputy receiver or its agents or employees with respect to any actions filed regarding the disposition of a claim filed with the guaranty association under this Act or to an issue other than the applicability or effect of the immunity created by Subsection (a). The association may contract with the attorney general under the Interagency Cooperation Act (Article

4413(32), Vernon's Texas Civil Statutes) to provide legal services not covered under this subsection.

* * *

Recognition of assessments in premium tax offset; assignment of credit

Sec. 21. (a) One hundred percent of any assessment paid by an insurer under this Act shall be allowed to that insurer as a credit against its premium tax under Article 4.10 of this code. The tax credit referred to in this section shall be allowed at a rate of 10 percent per year for 10 successive years following the date of assessment and, at the option of the insurer, may be taken over an additional number of years. The balance of any tax credit not claimed in a particular year may be reflected in the books and records of the insurer as an admitted asset of the insurer for all purposes, including exhibition in annual statements under Article 6.12 of this code.

(b) Available credit against premium tax allowed under Subsection (a) of this section may be transferred or assigned among or between insurers if:

(1) a merger, acquisition, or total assumption of reinsurance among or between the insurers occurs; or

(2) the commissioner by order approves the transfer or assignment.

TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION PLAN OF OPERATION

Sec. 1. General.

(a) The Texas Property and Casualty Insurance Guaranty Association is a non-profit, unincorporated legal entity created by Article 21.28-C, Texas Insurance Code, as amended.

(b) This plan of operation of the association is adopted pursuant to the requirements of the Act, and supersedes any prior plan of operation. This plan, and any amendments to this plan shall be adopted and become effective as provided in the Act, and shall govern the association and its operations. Provisions of the Act which are not expressly stated in this plan are incorporated in this plan by reference.

Sec. 2. Definitions.

In this plan:

"Act" means the Texas Property and Casualty Insurance Guaranty Act (Article 21.28-C, Vernon's Texas Insurance Code.)

"Association" means the Texas Property and Casualty Insurance Guaranty Association.

"Board" means the Board of Directors of the Texas Property and Casualty Insurance Guaranty Association.

"Commissioner" means the Commissioner of Insurance of the Texas Department of Insurance.

"Covered claim" has the meaning assigned by Section 5(8) of the Act.

"Designated official" shall mean and include any member of the board of directors and any employee of the association.

"Impaired Insurer" has the meaning assigned by Section 5(9) of the Act.

"Member Insurer" has the meaning assigned by Section 5(10) of the Act.

"Plan" means this plan of operation.

"Receiver" means the Commissioner of Insurance in his capacity as receiver pursuant to Art. 21.28, Texas Insurance Code or a Special Deputy Receiver appointed by the Commissioner.

Any additional definitions provided in the Act apply to this plan.

Sec. 3. Association.

(a) Membership.

(1) The Texas Property and Casualty Insurance Guaranty Association is a nonprofit, unincorporated legal entity composed of all member insurers, who must be members of the association as a condition of their authority to transact insurance in this state.

(2) Member insurers shall comply with this plan and the Act and failure to comply with this plan or the Act or to pay an assessment when due shall subject the member insurer to sanctions as provided in the Act.

(b) General Powers and Duties.

The powers and duties of the association are as set forth in this plan and more fully set forth in the Act.

(c) Right of Appeal.

A member insurer aggrieved by any final action or decision of the association regarding assessments may appeal to the board. After a final decision by the board, a member insurer may appeal that action or decision to the commissioner not later than the 30th day after the date of the action or decision.

Sec. 4. Participation in the Insolvency Process.

The board recognizes that, along with the commissioner, receiver and the receivership court, the association is a participant in the insolvency process created by the legislature in Arts. 21.28 and 21.28-C, Texas Insurance Code, and as such, shall endeavor to work with the commissioner, receiver and the receivership court to facilitate the effective and efficient administration of receivership estates and to carry out their respective powers and duties in Arts. 21.28 and 21.28-C, Texas Insurance Code.

Sec. 5. Board of Directors.

(a) Composition.

(1) The association is governed by a board of directors composed of nine persons.

(2) The composition of the board shall always be five industry members and four public members.

(3) If at any time during the period of service on the association's board of directors, any member ceases to be eligible to serve pursuant to Sec. 7(a) and (d) of the Act, that member shall immediately vacate his or her position on the board of directors.

(b) Selection.

(1) Industry members

The five industry members shall be elected by the member insurers. Each industry board member may select one nominee for each position to be filled by election. All nominees will appear on the ballot. The ballots will also contain a blank for member insurers to vote for a candidate whose name does not appear on the ballot. Ballots will be sent to the member insurers by the association to be returned by a date certain which shall appear on the ballot. Ballots shall be counted by the association and the name of the person elected will be forwarded to the commissioner by letter for approval.

If the commissioner does not approve a member insurer selected for membership on the board by the member insurers, the member insurers shall select and the board shall submit in writing to the commissioner the name of another member insurer selected to serve on the board as provided above.

(2) The four public members of the board shall be appointed as provided by the Act.

(3) If a vacancy occurs on the board, the members of the board shall elect, by majority vote, a person to fill the vacancy for the unexpired term and shall submit to the commissioner for approval the name of the

person elected. Nominations for public members will be made by the remaining public members and submitted to the board for its approval. Nomination for industry members will be made by the remaining industry members and submitted to the board for its approval. If the commissioner fails to approve a person elected by the board to fill a vacancy, the board shall elect and submit to the commissioner another person to serve as a board member.

(c) Terms of Office.

(1) Each term shall run from the beginning of the calendar year to the end of the sixth calendar year after the beginning of the member's term.

(2) The terms of three members of the board shall expire at the end of each odd-numbered calendar year.

(3) Directors shall be eligible to succeed themselves in office.

(d) Officers.

(1) The board shall elect from its membership a chairperson, a vice-chairperson, and a secretary-treasurer, and such other officers of the board as it deems necessary. At least one officer must be a public member.

(2) The chairperson shall preside at all meetings of the board and perform such other duties as may be prescribed by the board. When the chairperson is absent from a meeting, is unable to act, or refuses to act, the vice-chairperson shall perform the duties of the chairperson.

(3) The term of office for each officer of the board shall be one year, coinciding with the fiscal year of the association. An officer shall continue in office until his or her successor is elected.

(e) General Duties and Authority

The board shall carry out the duties required by the Act and may exercise the powers authorized by the Act. Except as limited by the Act, the board may exercise its powers and carry out its duties through its executive director or other persons designated by the board. The board may take such actions as are necessary to exercise the powers and carry out the duties provided in the Act and in this plan. The executive director or any designee of the board, to the extent authorized by the board, may take such actions as are necessary to exercise the powers and carry out the duties provided in the Act and this plan.

(f) Meetings.

(1) Regular Meetings.

(A) The board shall hold regular meetings at its main office in Travis County, Texas once each calendar quarter on the fourth Friday of the first month of each calendar quarter beginning at 9:00 a.m.; however, the date and time of a regular meeting may be changed upon notice.

(B) At each regular meeting, the board may take any action permitted by law. A quorum shall be required for official action by the board.

(C) All polices of the association related to fulfilling its statutory duties must be approved by the board. For the purpose of this provision, a policy shall mean a general statement of the principles by which the association is guided in the management of its business. Policy shall not include the procedures developed by the association which prescribe the process by which the association fulfills its statutory duties.

(D) All meetings of the Board of Directors shall be conducted in compliance with the open meetings law, Chapter 551, Government Code.

(2) Special Meetings.

Special meetings of the board may be called by the chairperson and shall be called upon request of the commissioner or any two board members with not less than 72 hours oral or written notice to each board member and the commissioner of the place, day and time of the meeting and of the general purpose or purposes for which the special meeting is to be held.

(3) Emergency Meetings.

Emergency meetings of the board may be called by the chairperson and shall be called upon request of the commissioner or any two board members with not less than 4 hours oral notice to each board member and the commissioner of the place, day and time of the meeting and of the reason for the emergency meeting.

(g) Expenses.

(1) Upon approval of the board, members of the board may be reimbursed from the assets of the association for expenses incurred by them as members of the board.

(2) Each member of the board is entitled to receive reimbursement for amounts actually spent in performing duties as a member of the board.

(3) The board shall adopt a form for and procedures to be followed for the reimbursement of expenses.

(4) Before a member of the board is reimbursed for his or her expenses, the member of the board must submit to the executive director a statement of expenses on a form approved by the board.

(5) Members of the board shall not otherwise be compensated by the association for their services.

(h) Audit.

The board will adopt an audit plan annually.

(i) Delegation of authority.

(1) The chairman of the board of directors may create committees or task forces and assign responsibilities to the committee or task force.

(2) The committee or task force may meet outside of a regular meeting of the board to consider the matters assigned to it.

(3) The committee or task force shall report its activities and recommendations to the board at a regular board meeting.

(j) Training.

Each member of the board shall receive training, including but not limited to, overviews of:

(1) the board members' statutory and fiduciary responsibilities;

(2) the association's investment policy;

(3) the Guaranty Act; and,

(4) open meetings.

Sec. 6. Operations.

(a) General.

(1) The official address of the association is the address of the main office of the association in Travis County, Texas.

(2) The fiscal year of the association is the calendar year.

(3) The association shall procure goods and services in accordance with its purchasing policy which shall include provisions for competitive bidding and competitive selection.

(b) Procedures Relating to Claims.

(1) The association shall exercise its powers and discharge its duties pursuant to Section 8 of the Act. Further, the association shall establish a claim filing procedure which includes, but is not limited to, notice by the

association to claimants, procedures for filing claims seeking recovery from the association, and a procedure for appealing the denial of claims by the association.

(2) Upon the commissioner's request, the association shall provide initial notice of impairment to insureds and other interested parties in a format which has been presented to the commissioner for review and comment. The association shall maintain a list of persons notified pursuant to this section.

(3) Acceptable claim forms shall include claims submitted on an accepted form of the impaired insurer prior to impairment or a proof of claim acceptable to the receiver subsequent to the impairment.

(4) Covered claims are considered filed with the association if:

(A) the claim existed in the company's records at the time of impairment;

(B) the claim is filed or received prior to the claim filing deadline applicable to the association, including claims referred by the receiver; or

(C) the claim is timely filed and the claimant follows written procedures established by the association.

(5) In response to the receipt of a claim, the association shall provide the claimant with a statement of the claimant's rights and obligations under the Act including an explanation of the claimant's statutory obligation to exhaust other insurance

accompanied by an "affidavit of other insurance" and the association's procedure for appealing the denial of a claim.

(6) Any denial of a claim, whether in whole or in part, by the association shall be made in writing. The claimant shall be informed of the reason for denial and notified that the denial does not preclude any rights or remedies which may be available to the claimant.

(7) The association shall establish an internal procedure for claimants to appeal the denial of a claim. The appeal shall include review by association management.

(c) Reporting.

(1) The association shall provide all information requested by the receiver or special deputy receiver regarding claims processed by the association.

(2) Upon the closure of an estate, the association shall provide certification of the status of the association's discharge of its duties under the Act relative to that estate.

(d) Assets and Deposits.

(1) The association may open and maintain accounts for funds of the association in one or more banks, savings and loan associations, and other financial institutions and also, may deposit funds into the Texas Treasury Safekeeping Trust Company, Except for the Texas Treasury Safekeeping Trust Company, funds maintained in these financial institutions must be insured by a federal agency that provides for deposit

insurance or must be fully secured with bonds, notes, securities, or other evidences of indebtedness supported by the full faith and credit of the United States or guaranteed as to principal and interest by the United States. If the balance in an association account under the subsection insured by a federal agency exceeds the amount of the federal insurance, the board must enter into an agreement with the financial institution requiring security as described in this subdivision that is equivalent to the amount that exceeds the maximum amount insured.

(2) Funds of the association may be invested and reinvested by the board or its authorized representative in any manner approved by the board in its investment policy.

(3) The association may delegate deposit and withdrawal authority relating to its accounts to specified officers and employees and shall require those officers and employees to be covered by appropriate bonds. Money may be withdrawn from any of the association accounts, provided that signatures of at least two persons authorized by the board shall be required on any withdrawals and transfers to accounts other than those of the association.

(4) All assets of the association deposited in accounts under Subdivision (1) of this subsection shall be deposited in the name of the association and all other assets of the association must be owned or held in the

name of the association. An up-to-date, current inventory of the assets of the association, describing the type and location of assets, shall be kept as a part of the financial records of the association, properly accounting for the cost or value of the assets and their depreciation, if any. The board may establish any additional procedures consistent with the Act for the handling of any assets of the association.

(5) A record shall be maintained at the main office of the association of all assets and deposits of the association and all financial transactions of the association, its agents, and the board relating to the association. Documentation relating to all such assets, deposits, and transactions shall be made and maintained by the association in accordance with generally accepted accounting standards.

(e) Assessments.

(1) Purpose of Assessments.

(A) The association shall assess member insurers for amounts necessary to pay:

(i) the obligations of the association under Section 8(a) of the Act;

(ii) the expenses of handling covered claims;

(iii) administrative expenses as authorized by the Act; and

(iv) other expenses as authorized by the Act.

(B) Assessments shall be determined pursuant to an assessment policy adopted by the board. A copy of the association's assessment policy shall be provided to association members at their request.

(2) Collection of Assessments.

The association shall calculate and collect assessments from its member insurers pursuant to the Act. The association shall report to the commissioner any delinquencies in the payment of assessments by any member insurers.

(3) Special authority to assess.

In the event of a natural disaster or other catastrophic event which creates substantial covered claim liability for the association, the board shall authorize the chairman to contact the commissioner of insurance to review the association's ability to meet its liability obligations under the Act.

If the chairman and the commissioner determine by this review that the association is in need of funds beyond its ability to assess member insurers, the chairman and the commissioner of insurance shall make application to the governor in accordance with the Act for the authority to assess an additional 2% in the other lines category.

This authority to assess is limited to the year in which it is granted. If additional funds are required to discharge the association's statutory obligations resulting from the natural disaster or catastrophic event in the following year, the chairman and the

commissioner of insurance will be required to seek additional authority from the governor in the above described manner.

(f) Borrowing Funds.

(1) On a majority vote of the members of the board, the board may authorize the chairperson or another designated member of the board to borrow funds necessary to carry out the powers and duties of the association.

(2) At the time the board authorizes the chairperson or other member of the board to borrow funds on behalf of the association, the board shall establish the terms and conditions under which the chairperson or the other designated member of the board will borrow the funds.

(3) The chairperson, or other person designated by the board to borrow funds on behalf of the association shall report to the board regarding borrowed funds at its next regular meeting following completion of the loan transaction, unless required to report at an earlier time. The association shall maintain detailed written records relating to all borrowed funds.

Sec. 7. Indemnification

Indemnification Against Liability.

The association shall indemnify designated officials pursuant to an indemnification policy adopted by the board.

/s/ G. Ron Nichols
G. Ron Nichols
Chairman,
Board of Directors

APPROVED:

/s/ Elton Bomer
Commissioner of Insurance